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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-448

AL. A. MARTH, as Trustee in Bankruptcy of Pete Horner Excavating, Inc., an Arizona Corporation,

Petitioner,

vs.

MARTHA MAYTAG DANNERBECK, and OSCAR C. PALMER, SR., and CORRINE E. PALMER, his wife,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent Dannerbeck in Opposition

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Brief for Respondent Dannerbeck in Opposition

Respondent Martha Maytag Dannerbeck requests that the Petition for Writ of Certiorari in this matter be denied.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Arizona appears in the Appendix, page 1A of the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court appears in the Appendix, page 10A, of the Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on July 17, 1974. A petition for rehearing was denied on August 12, 1974. The Petition for Writ of Certiorari was filed on October 16, 1974. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Petition for Certiorari enumerates six "Questions Presented." Question (1), relating to diversity jurisdiction, was not raised below. Question (2), concerning alleged exclusive bankruptcy court jurisdiction, is not properly before this court because the Bankruptcy Court, by its own order long since final, expressly consented to district court jurisdiction. Question (6) relates only to the respondents Palmer. The remaining questions (3, 4 and 5) are but variations on a single theme, i.e. that it was somehow wrong for one who honored an indemnity obligation to sureties to be subrogated to the undisputed rights of those sureties to funds. Insofar as the respondent Dannerbeck is concerned, the only question before this Court is:

> Was the District Court correct in granting and the Court of Appeals in affirming, judgment that the trustee in bankruptcy had no claim to city street contract funds which: (1) never became due and owing to the bankrupt's estate; and (2) were charged with an equitable lien or prior right in favor of the completing and paying sureties and their indemnitor.

STATUTE INVOLVED

28 U.S.C. 1332.

STATEMENT OF THE CASE

A. Factual Background

This litigation concerns the parties' rights in and to the proceeds of certain city street improvement contracts.

Initially two diversity cases for declaratory relief were filed in July, 1966, by two sureties for Pete Horner Excavating, a bankrupt contractor which had defaulted on the city street contracts. The plaintiffs-sureties, neither of which was a citizen of Arizona, sought a declaratory judgment that they were entitled to receive the contract proceeds to the extent they had paid to complete the contracts under performance bonds and had paid the claims of laborers and materialmen under payment bonds.

The defendants were Arizona citizens Mr. and Mrs. Oscar Palmer, three Arizona cities, and Al Marth, the contractor's trustee in bankruptcy. The Palmers had advanced monies to the contractor and claimed the contract proceeds by virtue of certain assignments. The cities, which had entered into the contracts with Pete Horner Excavating, asserted no claim to the contract proceeds.

After institution of the suits by the sureties, respondent Martha Maytag Dannerbeck (an Arizona citizen), pursuant to written indemnity agreements, reimbursed both sureties the full amount of her indemnity obligation. In November, 1968, she was substituted as plaintiff in each action pursuant to stipulation and order. She continued the actions, as subrogee of the sureties, to recover the proceeds of the city street contracts to the extent she had reimbursed the sureties.

The circumstances leading to Mrs. Dannerbeck executing indemnity agreements in favor of the sureties were as follows: In October 1963, her cousin, Peter Horner, and her husband, Jon Dannerbeck, formed a contracting partnership and in April, 1964, decided to incorporate. Her husband used $6,000 of her money to buy stock in the company and Jon became the corporate vice president and secretary. Pete Horner was president and treasurer.

In order to perform improvement district street contracts for an Arizona municipality, contractors must post performance and payment bonds, A.R.S. § 9-684. For the contracts in question, the sureties issued the bonds but required that Mrs. Dannerbeck (a woman of substantial separate property), along with her husband and Horner, execute indemnity agreements in favor of the sureties. Mrs. Dannerbeck's purpose in executing the indemnity agreements was to assist her husband in the business. She was never a director or officer of the corporation, nor was she a minority stockholder. Her only beneficial interest in the corporation was her community property interest in her husband's corporate salary. She took no part in the business affairs of the corporation. (Court of Appeals Opinion, Petition Appendix pp. 15a-17a).

Pete Horner Excavating financed its construction contracts for the cities by funds supplied by the respondents Palmer in exchange for assignments by Pete Horner Excavating to the Palmers of the city bonds to be issued upon the completion of the contracts.

By fall of 1965, Jon had lost interest in the contracting business and Horner agreed to buy Jon's stock from him. In December of 1965, Jon resigned as an officer and director of the Pete Horner Excavating. It was not until summer of 1966, however, that the Dannerbecks cancelled their indemnity agreements, and by that time the contract defaults had occurred and liability on the indemnity agreements had matured.

B. Court Proceedings Below

After the sureties' suits were filed and before they were reimbursed by Martha Maytag Dannerbeck, the Bankruptcy Court entered its order allowing and permitting petitioner Marth, as trustee, to be named a party in the sureties' suits.

The Trustee filed answers to the complaints and admitted jurisdiction. Furthermore, the trustee admitted that the rights of the sureties were superior to the rights of the Trustee as to the amount of claims for labor and materials which had been paid out under the bonds plus the cost of completing each project.

In December 1968, after her substitution as plaintiff, respondent Dannerbeck filed a second amended complaint in each action seeking the contract proceeds in her own right as indemnitor-subrogee of the sureties. When the Trustee answered the second amended complaint he again admitted that the sureties had an equitable priority in and to the contract proceeds; but he denied that respondent Dannerbeck, as the sureties indemnitor, had the same priority.

On September 14, 1971, for the first time, the Trustee requested, as an alternative to deciding the case on the merits in favor of the Trustee, that the matter be remanded to the Bankruptcy Court for disposition although there was no contention that the Bankruptcy Court had exclusive jurisdiction.

Upon motions for summary judgment by all parties, the District Court ruled that respondent Dannerbeck, as subrogee of the sureties, had a priority claim to the extent she indemnified the sureties for payments made to complete and satisfy labor and material claims on the street contracts. The District Court awarded the balance of the contract proceeds to the respondents Palmers. The District Court denied the Trustee's claim to the proceeds pursuant to *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962) and *In Re Dutcher Construction Corporation*, 378 F.2d 866 (2nd Cir. 1967). Only the Trustee appealed from the judgment of the District Court. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR DENYING THE WRIT

A. The Lower Courts Properly Analyzed the Facts and Determined Questions of Law That Should Not Be Reviewed Here

This Court will ordinarily deny certiorari, where as here, review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, or upon the construction of particular contracts or written instruments. *United States v. Johnston*, 268 U.S. 220 (1925); see generally, *R. Stearn & E. Gressman, Supreme Court Practice*, 172 (4th Ed. 1969). As this Court stated in *United States v. Johnston*, 268 U.S. 220, 227 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." This is particularly true when the two courts below have concurred. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949) and cases cited therein: *Berenyi v. District Director, Imm. & Nat. Serv.*, 385 U.S. 630 (1967).

Both the District Court and the Court of Appeals properly determined that the construction contract funds to which the Trustee is laying claim never were a part of the bankrupt's estate available to the general creditors. The funds never became due and owing to the bankrupt contractor because it defaulted in its performance of the contract. *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962) and *In Re Dutcher Construction Corporation*, 378 F.2d 866 (2nd Cir. 1967). The Courts further correctly found no compelling equity in favor of the general creditors which would call for disregard of the general rule that an indemnitor who has fulfilled her obligation to a surety, is subrogated to all rights which the surety has with respect to available funds. See, *e.g., Reid v. Pauley*, 121 F. 652 (9th Cir. 1903) and other decisions cited by the Court of Appeals at Petition Appendix 12a, n. 2. In this regard, the Court of Appeals observed that:

"had the surety companies settled and paid the claims themselves, they could have proceeded against the contract funds as subrogees. Or they could have moved against Mrs. Dannerbeck as indemnitor. The fact that *she chose to settle the* claims and advance funds to the sureties, in advance of payments by them, does not alter the basic fact that she was discharging an indemnitor's obligation. To hold otherwise would be to exalt form over substance." (Petition Appendix p. 17a).

The Courts properly found that allowing the indemnitor the right of subrogation did not deprive the general creditors of anything because if the labor and material claims had not been paid by the sureties or their indemnitor, the funds would in any event not have been available to the general creditors but would have gone directly to the laborers and materialmen. *Jacobs v. Northeastern Corporation,* 416 Pa. 417, 206 A.2d 49 (1965); *In Re Dutcher Construction Corporation,* 378 F.2d 866 (2nd Cir. 1967).

With respect to the claim of exclusive bankruptcy jurisdiction raised by the Trustee, the Courts properly rejected the Trustee's argument and reliance on *Pepper v. Litton,* 308 U.S. 295 (1939). In *Pepper v. Litton,* unlike the situation here, the court was speaking of the administration of bankrupt estates. It was undisputed in the case at bar that the contract proceeds were never in actual or constructive possession of the bankrupt contractor because they were never earned by the bankrupt. Consequently, all respondents had an absolute right to have their claims "adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.'" *Cline v. Kaplan,* 323 U.S. 97, 99 (1944).

Furthermore, the Courts below properly noted that the Bankruptcy Court entered an order which became final allowing and permitting the Trustee to appear and defend in the plenary actions. The Trustee, in fact, did so appear,

answered the complaints and admitted jurisdiction. As the Court of Appeals perceived, the Trustee never did contend that the Bankruptcy Court had exclusive jurisdiction and, in fact, the Trustee himself expressed the willingness to have the plenary actions proceed, provided that he prevailed. (Petition Appendix, p. 21a, n. 11.).

B. There Is No Conflict of Decisions

Petitioner's assertion that the decision in the instant case is in conflict with decisions of this Court and the circuit courts is totally unsupported. Nowhere has petitioner directed attention to any particular decision of this Court or the circuit courts which is in conflict with the decision in the instant case.

C. Petitioner's Argument as to Lack of Diversity Jurisdiction Is Without Merit

The argument that there was no diversity jurisdiction, raised for the first time in the Petition for Certiorari, is without merit. There is no question but that there was diversity of citizenship at the commencement of the filing of the actions by the sureties. The fact that the respondent Dannerbeck was later substituted as plaintiff in the original actions did not defeat diversity jurisdiction which existed at the commencement of the filing of the suits. As Chief Justice Marshall observed as long ago as 1824:

> "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."

Mollan v. Torrance, 9 Wheat 537, 6 L.Ed. 154. See also *Clarke v. Mathewson*, 12 Peters 164, 9 L.Ed. 1041 (1838); *Niesz v. Gorsuch*, 295 F.2d 909 (9th Cir. 1961) and *Formulabs, Incorporated v. Hartley Pen Company*, 318 F.2d 485 (9th Cir. 1963).

CONCLUSION

Petitioner has wholly failed to sustain his burden of establishing, under Rule 19, that there are "special and important reasons" why the Writ should be granted. The decision below did not involve an important question of law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another court of appeals on the same matter. The Court of Appeals correctly held that the findings and judgment of the District Court were proper and so affirmed. It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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